



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

September 11, 1995

Ms. Christine T. Rodriguez  
Staff Attorney  
Legal Services 110-1A  
Texas Department of Insurance  
P.O. Box 149104  
Austin, Texas 78714-9104

OR95-923

Dear Ms. Rodriguez:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 25472.

The Texas Department of Insurance (the "department") has received a request for information concerning the review of complaints filed against a certain insurance agent. You have informed us that the requested information relates to an ongoing investigation of this particular agent and that such investigation will culminate in an administrative contested case with the named person as a party. You assert that the requested information is directly related to the litigation and therefore should be withheld from public disclosure pursuant to section 552.103 of the Government Code. See Open Records Decision Nos. 588 (1991), 551 (1990); Open Records Letter Ruling No. 90-475 (1990). Further, you state that some of the requested information includes intra-agency memoranda which would not be available by law to a party in litigation with the agency. In so stating, you assert that such information is excepted from required public disclosure under section 552.111 of the Open Records Act, as interpreted in Open Records Decision No. 615 (1993) and *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), because they contain information providing either advice, opinion, or recommendations reflecting the deliberative processes of TDI employees. You have provided this office with representative samples of the information that you assert is not subject to required public disclosure.<sup>1</sup>

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<sup>1</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.103 excepts from required public disclosure information relating to litigation "to which the state or political subdivision . . . is or may be a party." Gov't Code § 552.103(a). More specifically, section 552.103(a) excepts from required disclosure, information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

This exception is designed to keep the Open Records Act from operating as a method of avoiding the rules of discovery. Attorney General Opinion JM-1048 (1989) at 4. In *Open Records Decision No. 551 (1990)* at 3, this office stated:

[Section 552.103] enables governmental entities to protect their position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery, if at all. [citations omitted.] We do not believe that the Open Records Act was intended to provide parties involved in litigation any earlier or greater access to information than was already available directly in such litigation.

Section 552.103 requires concrete evidence that litigation is realistically contemplated; it must be more than mere conjecture. *Open Records Decision Nos. 518 (1989) at 5, 328 (1982)*. Thus, to secure the protection of this exception, a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. *Open Records Decision No. 551 (1990)*; *see also Open Records Decision No. 588 (1991)* (contested case under Administrative Procedure Act is litigation for purposes of section 552.103 exception).

You have enclosed copies of documents indicating that charges of misrepresentation and conversion have been made against a particular agent and that the case has been referred to legal services for an ongoing investigation concerning such allegations. The enclosed documents also state that the agent has been placed on administrative review. There is no indication that the case has reached final disposition.

We conclude that the department has demonstrated that litigation is reasonably anticipated in this instance. Thus, the department may withhold the requested information based on section 552.103 of the Gov't Code.

However, if the parties to the litigation obtain access to these documents through the discovery process or otherwise, no section 552.103(a) interest will generally exist in that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, if all of the opposing parties in the litigation have access to these documents, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982).

Having concluded that the department may withhold the requested information based on section 552.103, we need not address your claims under section 552.111. We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Toya Cirica Cook  
Assistant Attorney General  
Open Records Division

TCC/rho

Ref.: ID# 25472

Enclosures: Submitted documents

cc: Mr. Jeffery A. Meyers  
American United Life Insurance Company  
P.O. Box 368  
Indianapolis, Indiana 46206-0368  
(w/o enclosures)

Ms. Lori Duff  
Equifax  
P.O. Box 100065  
Atlanta, Georgia 30348  
(w/o enclosures)